

## ASAPs

### National

# Damned If You Do, Damned If You Don't: Terminating Accused Harasser Can Lead to Liability for "Sex Stereotyping"

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Most employers are well aware of their obligation to promptly and thoroughly investigate complaints of sexual harassment. Although the right to an adequate investigation is most commonly associated with the alleged victim, a recent decision by the Second Circuit Court of Appeals (covering New York, Connecticut, and Vermont) illustrates that an employer's failure to investigate can lead to claims by the accused harasser as well.

In *Sassaman v. Gamache*, no. 07-2721-cv (2d Cir. May 22, 2009), the plaintiff (Sassaman) was discharged after a female coworker accused him of sexual harassment. According to Sassaman, his employer made minimal - if any - efforts to verify the accusations against him. Additionally, Sassaman alleged that when he was informed of his discharge, his supervisor stated: "I really don't have any choice. Michelle [the alleged victim of harassment] knows a lot of attorneys; I'm afraid she'll sue me. *And besides you probably did what she said you did because you're male and nobody would believe you anyway.*" Sassaman sued under Title VII, arguing that his supervisor's statement was evidence that impermissible "sex stereotyping" (*i.e.* that men have a propensity to engage in sexual harassment) played a role in the decision to terminate his employment.

The Second Circuit agreed, holding that the supervisor's statement, combined with the employer's failure to adequately investigate the harassment complaint, "would permit a

reasonable jury to infer discrimination based on sex stereotyping." Significantly, the court relied heavily on the failure to investigate as evidence that the employer "rushed to judgment" due to gender-based behavioral assumptions, stating, "just as the lack of an investigation of a reported claim of harassment may factor into the determination of an employer's liability for discrimination against the complainant, so too may it indicate discrimination by an employer whose adverse determination against the putative harasser otherwise bears indicia of prohibited discrimination." Finally, the court rejected the contention that precipitous action against an accused harasser may be justified by fear of being sued by the complaining employee: "[A]n employer may not rely on an alleged fear of a lawsuit as a reason to shortcut its investigation of harassment and to justify an employment decision adverse to the putative harasser that in itself violated Title VII."

Although overtly expressed stereotypes such as the comment in *Sassaman* ("you probably did what she said you did because you're male") will be rare, the case is nevertheless important because it opens the door for potential Title VII claims by accused harassers who believe they were the victim of a *pro forma* or otherwise inadequate investigation, and who allege that their employer was predisposed to credit the complainant's allegations due to sex stereotyping. Whether courts will require the type of direct evidence of stereotyping found in *Sassaman* remains to be seen. However, it is probable that less overt, more circumstantial evidence of male stereotyping will be accepted, at least for purposes of establishing a *prima facie* case. Thus, although it may be tempting from both a time and risk standpoint to simply credit the allegations of a complaining employee, employers should be mindful that such shortcuts can result in legal liability.

In particular, if courts permit these types of gender stereotyping claims without the existence of direct evidence, employers will be forced to carefully evaluate and document both the evidence of alleged harassment and their related credibility determinations. The stereotyping/litigation avoidance issue may be most concerning in a "she said, he said" case, where some employers are prone to give a higher level of credence to the female complainant on the theory that liability is less likely to arise if the employer takes *some* action against the accused. If the situation is truly a "tie game," however, acting simply to avoid potential liability could place the employer in a difficult position under *Sassaman*. However, if the employer can point to a well-conducted investigation and specific reasons for the credibility determinations it made, it should be able to avoid liability.

Finally, *Sassaman* serves to further highlight the need for employers to conduct prompt, thorough, and impartial harassment investigations - not only as a defense against claims by the complaining employee, but also to prevent the type of "sex stereotyping" claim successfully asserted by the putative harasser in that case. Employers should consider consulting with experienced employment counsel for assistance in ensuring that such complaints are investigated in an appropriate and defensible manner from all perspectives. Where credibility determinations are made as part of an investigation, experienced employment counsel can also assist in evaluating the perceived legitimacy of such decisions.

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